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Millstein To Receive Miller Award Restructuring Accomplishments Include AIG Rescue

by Dave Buzzell

As a restructuring attorney, investment banker, public servant, and now entrepreneur, Jim Millstein has been at the center of many of the nation's most important rescue missions, making him a deserving recipient of the Harvey Miller Award for Outstanding Service to the Restructuring Industry. Millstein will be recognized at the 21st Distressed Investing Conference on December 1 in New York City.

Becoming a restructuring practitioner was not what Millstein had in mind when he attended Princeton University in the mid-1970s. He foresaw instead a career that involved government service in one form or another. He worked for House Speaker Tip O'Neill on Capitol Hill during one of the most turbulent times in U.S. history, the summer of

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Momentous Decision in Momentive? Enforceability of Make-Whole Provisions in Doubt

by Julie Schaeffer

The United States Bankruptcy Court for the Southern District of New York has issued a ruling that questions the enforceability of make-whole provisions in the context of a bankruptcy – and may serve as a guide for those drafting make-whole provisions in indentures.

Outside of bankruptcy, make-whole provisions – which compensate noteholders for lost interest when debt is paid early – are simple. To determine if a creditor is entitled to be “made whole,” you simply look at the indenture that governs the debt and applicable law. Inside bankruptcy, however, the issue becomes more complicated, with a multilayered

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Revisiting Meridian

Additional Perspective on “Eligible Assignee” Ruling

by Julie Schaeffer

In September, we explained the impact of a ruling prohibiting the transfer of a secured lender's interest in a loan on the grounds that the transferee is not an “eligible assignee” under the loan agreement. The case has generated so much publicity, we sought out the Loan Syndications & Trading Association (LSTA) to determine how its members view the ruling. Its members include the sell-side, the buy-side, law firms, and vendors.

To recap the case, distressed-debt funds had acquired the debt of Meridian Sunrise Village from one of its lenders, which it was only permitted to do if it was an “eligible assignee” under the terms of the loan agreement between Meridian and

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Millstein, *from page 1*

President Nixon's impeachment. He went on to graduate summa cum laude from Princeton with a B.A. in politics and headed to the University of California Berkeley, where he graduated summa cum laude with an M.A. in political science. Millstein then embarked for law school, the final step in a plan to eventually return to Washington, D.C.

However, opportunity for government service is not always a function of expertise and experience, but rather, which side is in power and which side is out. By the time Millstein had received his law degree from Columbia Law School, the Executive Branch was the province of President Reagan and the Republicans. So Millstein joined Cleary, Gottlieb, Steen and Hamilton in 1982, a choice that ended with him becoming one of the nation's most successful restructuring attorneys.

"I wasn't much of a lawyer in my early years at Cleary," Millstein laughs, "because I hadn't really intended to be a practicing lawyer, but eventually I got the hang of it." That he did, quickly moving into a leadership position in Cleary's corporate restructuring practice. During the 1990s, Cleary became one of the world's top international restructuring practices, representing debtors such as Pan American Airlines in the United States, Cadillac Fairview in Canada, EuroDisney in France, and Daewoo Corporation in Korea.

During the Daewoo restructuring, Millstein brought in Lazard, which had multiple offices in Europe and Asia, to help with the Korean company's global restructuring, and it was Lazard that became his next employer. "After working with Lazard on Daewoo, they made me an offer I couldn't refuse," says Millstein. He joined Lazard's fledgling U.S. restructuring practice as the firm's third partner in that group, joining Barry Ridings and Terry Savage, both hired a year earlier. Together they embarked on an amazing run.

When Millstein moved to Lazard in 2000, NASDAQ was approaching 5000 and about to fall off a cliff. "All of the high-yield debt raised in the nineties for fledgling Internet companies, fiber optic cable companies, mobile telecom companies, cable companies, it all collapsed," Millstein recalls.

Lazard's restructuring practice

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approach that analyzes the indenture under applicable state law, then brings in bankruptcy law.

First, the indenture is analyzed under applicable state law to determine three things. Is there a make-whole provision? If there is a make-whole provision, has it been triggered? If there is a make-whole provision and it has been triggered, is it enforceable under applicable state law?

If the answers are yes, the make-whole provision is analyzed under bankruptcy law to determine four things. Does the bankruptcy filing automatically accelerate the obligations under the controlling contract (the indenture)? If so, does that acceleration trigger a make-whole provision? Should the make-whole provision be disallowed as a claim for "unmatured interest?" Is the indenture trustee or lender able to decelerate the acceleration caused by the bankruptcy filing?

This process played out in the bankruptcy of MPM Silicones, LLC, a specialty chemicals manufacturing company, and certain affiliates, which filed for Chapter 11 in April 2014. Under the company's plan of reorganization, senior noteholders were to be paid in full, in cash, but without the interest that would have accrued all the way through the original 2015 maturity of the notes. That interest was more than \$200 million.

The senior noteholders objected to the confirmation of the plan on the grounds that it violated the terms of the indenture, which provided for payment of a make-whole premium in the event of any redemption of the notes before October 2015 – and a redemption of the notes occurred with the automatic acceleration of the notes upon the filing of the bankruptcy.

MPM Silicones disagreed on the grounds that there was not a voluntary redemption of the notes before October 2015; instead, the maturity date was automatically accelerated by the bankruptcy filing. Because the indenture did not expressly require a payment following an automatic acceleration of the maturity date, MPM Silicones argued, no make-whole premium was due.

At the confirmation hearing for the plan of reorganization, Judge Robert D. Drain ruled against the senior noteholders, primarily on the grounds that the language in the indenture relating to the make-whole

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Meridian, *from page 1*

its lenders. Shortly thereafter, Meridian filed for bankruptcy, and sought an injunction to prevent the distressed-debt funds from exercising eligible assignee rights, including voting on its plan of reorganization. The distressed-debt funds argued that they were eligible assignees, as the definition of eligible assignee in the loan agreement included "financial institutions." Meridian, however, argued that the distressed-debt funds were not eligible assignees because they were not financial institutions as commonly understood. Ultimately, the U.S. District Court for the Western District of Washington ruled that the distressed-debt funds were not financial institutions.

The case is significant because it has created a challenge for borrowers, lenders, and distressed-debt funds. Indeed, it invited so many questions, that David Griffiths, a senior associate in the Business Finance & Restructuring Department at Weil, Gotshal & Manges LLP and writer for the Weil Bankruptcy Blog, interviewed Bridget Marsh, deputy general counsel of the LSTA. We gleaned the following from that interview.

Loan-market participants sometimes document their loans on LSTA forms and sometimes use bespoke agreements. Loans made by U.S. borrowers that are traded in the secondary loan market typically use the standard LSTA confirmation, then settle those loan trades on one of the LSTA's standard documents. With the primary market, however, it's different, because the LSTA does not have a complete form credit agreement. Instead, it publishes "model credit agreement provisions" (MCAPs), which have expanded over the years to include provisions relating to amend and extend transactions, defaulting lender language, borrower and sponsor loan buybacks, and disqualified lender lists.

Marsh, quoted here with permission, says that recommending a definition for the term "financial institution" is beyond the organization's scope, but she is concerned about the narrow interpretation of the U.S. District Court for the Western District of Washington. "The LSTA, reflecting the view of the market, takes a broad view of the meaning of "financial institutions" and, therefore, we were concerned about the

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Research Report

Who's Who Trump in Entertainment Resorts, Inc.

by Françoise C. Arsenault

Trump Entertainment Resorts, Inc. (Trump Entertainment) was founded by Donald J. Trump, who served as the Chairman of the Board of Directors until his resignation in 2009. The company now operates only one property, the Trump Taj Mahal Casino Resort in Atlantic City, New Jersey, which has approximately 2,500 slot machines, 177 gaming tables, and more than 2,200 hotel rooms. The Trump Plaza Hotel and Casino in Atlantic City, the second property owned by Trump Entertainment, closed on September 16, 2014. This bankruptcy filing is the fourth filing (1991, 2004, 2009, and 2014) for Trump Entertainment Resorts or its corporate predecessors. Donald Trump now owns about 10 percent of the stock in the company, but has no control or involvement with the company. He and Ivanka Trump filed a lawsuit in August 2014 in state court in New Jersey to have the Trump name removed from the corporate properties. A hearing has been held and a ruling is expected later.

On September 9, 2014, Trump Entertainment Resorts, Inc. and its seven affiliated debtors filed for Chapter 11 reorganization in the United States Bankruptcy Court for the District of Delaware. In the bankruptcy filing, Trump Entertainment listed assets of no more than \$50,000 and liabilities of between \$100 million and \$500 million. The Trump Taj Mahal lost \$35 million in the first six months of 2014 and the Trump Plaza lost almost \$10 million in the same period. Company officials cited a number of reasons for the Chapter 11 filing, including the steep decline in casino revenues caused by new regional competition, the cost of debt servicing, and tax increases. The company has not been able to obtain post-petition financing.

On October 1, 2014, Trump Entertainment filed a motion with the bankruptcy court for approval of their Disclosure Statement. A hearing on the proposed joint Plan of Reorganization and Disclosure Statement has been scheduled for November 5. Under the proposed Plan

of Reorganization, the billionaire investor Carl Icahn, who owns approximately \$292 million in Trump Taj Mahal debt, would invest another \$100 million in the Trump Taj Mahal and would forgive a portion of the debt he is owed in exchange for 55 percent of new common stock issued by a reorganized Trump Entertainment Resorts.

On October 17, 2014, the bankruptcy judge granted the request of Trump Entertainment to terminate union health care and pension contracts with Unite Here Local 54, the union representing about one-third of the 3,000 workers at the Trump Taj Mahal, resulting in about \$15 million in savings. According to company officials, the concessions were needed to avoid liquidation and the closure of the casino in mid-November.

The Trump Plaza in Atlantic City was the fourth major casino to close in 2014. Others included the Showboat, owned by Caesars Entertainment, and the Revel Casino Resort. Casino revenue in Atlantic City has fallen more than 40 percent, to less than \$3 billion in 2013 from a peak of \$5.2 billion in 2006.

The Debtor

Robert F. Griffin is the Chairman of the Board of Directors and the Chief Executive Officer of Trump Entertainment Resorts, Inc. and the General Manager of the Trump Taj Mahal. **David R. Hughes** is the Chief Financial Officer.

The law firm of **Stroock & Stroock & Lavan LLP** is serving as the bankruptcy counsel to Trump Entertainment. The team includes **Kristopher M. Hansen**, **Erez E. Gilad**, **Curtis C. Mechling**, and **Kenneth Pacquale**, partners, and **Gabriel E. Sasson** and **Jennifer Arbuse**, associates with the firm.

Young Conaway Stargatt & Taylor LLP is acting as the bankruptcy co-counsel to Trump Entertainment. **Matthew B. Lunn**, a partner, and **Robert F. Poppiti, Jr.**, **Ian J. Bambrick**, and **Ashley E. Markow**, associates, are working on the case.

Sills Cummis & Gross P.C. is serving as the special counsel and government

affairs and regulatory services provider to Trump Entertainment. Working on the case are **Ted Zangari**, a partner, **Kenneth F. Oettle**, senior counsel, **Diane M. Lavenda**, **Steven Mairella**, and **Peter M. Flannery**, of counsel, and **Adam J. Faiella**, an associate with the firm.

Houlihan Lokey, Inc. is providing Trump Entertainment with financial advisory and investment banking services. The engagement team includes **William H. Hardie, III**, a managing director, **Jay Weinberger**, a senior vice president, and **Drew Talarico**, a vice president.

Ernst & Young LLP is serving as the auditor and tax advisor to Trump Entertainment. **Christopher L. Bruner**, a managing partner in the Philadelphia office, leads the engagement.

The Official Committee of Unsecured Creditors

The Committee includes **Thermal Energy Limited Partnership I**; **Bally Gaming, Inc.**; **Unite Here Local 54**; **National Retirement Fund**; **Atlantic City Linen Supply, LLC**; **South New Jersey Paper Products**; and **Conner Strong & Buckelew Companies, Inc.**

The law firm of **Gibbons P.C.** is serving as the counsel to the Committee. Working on the case are **Karen A. Giannelli**, a partner and Chair, **Financial Restructuring & Creditors' Rights**, **Mark B. Conlan** and **Guy V. Amoresano**, partners, and **Natasha M. Songonuga** and **J. Brugh Lower**, associates with the firm.

The Law Office of Nathan A. Schultz, P.C. is the co-counsel to the Committee. **Nathan A. Schultz**, partner, directs the work.

PricewaterhouseCoopers LLP is providing the Committee with financial advisory services. The engagement is being led by **Perry Mandarino**, a partner in the firm's New York office and Business Recovery Services Leader.

The Trustee

The U.S. Trustee is **Roberta A. DeAngelis**.

The Judge

The judge is the **Honorable Kevin Gross**. □

Millstein, from page 2

boomed, however. “We went from having a small niche practice to having a dominant restructuring business around the world,” Millstein notes. As a Lazard managing director and global co-head of corporate restructuring, Millstein tackled many of the thorniest restructurings of the decade, including work for the United Auto Workers in the restructuring of its contracts with GM, Ford, and Chrysler; Charter Communications in its pre-packaged plan of reorganization; and WorldCom in its reorganization.

Millstein was still at Lazard when the financial crisis hit in 2007 and 2008. This time the primary culprit was the deterioration of the subprime mortgage market, and among the first dominoes to fall were Bear Stearns, Lehman Brothers, and other heavy investors in securitized mortgages, as well as American International Group (AIG), the principal insurer of those securities.

By the summer of 2008, the U.S. financial system was on the verge of collapse when Millstein got a call that would change his career yet again. The caller was part of Barack Obama’s inner circle, with ties going back to their work together on the *Harvard Law Review*. The caller wanted Millstein’s perspective on what was happening in the credit markets, which led to him to a series of discussions with candidate Obama’s economic advisers. After the presidential candidate became President-elect, Millstein was asked to serve as the restructuring guy on the Treasury Department’s transition team. Nearly 30 years later, Millstein was back in Washington and in the middle of a national economic emergency.

Today, with the Dow Jones and S&P hitting record highs and unemployment falling below 6 percent, it might be easy to forget the perilous condition of the U.S. economy at the time. “Every weekend there was a new bailout, every week there was another new government program to try to

stem the crisis,” Millstein recalls.

“Immediately after the election, I joined a team engaged in a massive triage operation run out of the Treasury Department, Federal Reserve, and Federal Deposit Insurance Corporation,” Millstein continues. “Given the imminent change in administrations, and the fact that the top Treasury people managing the government’s response to the crisis were about to leave office, the transition between administrations was even more important than normal. The Obama transition team became more and more involved in crisis management during the fourth quarter of 2008 because it was clear that we were going to have to pick up the baton and run with it in January.”

Thrust into the operating room, Millstein was put to work analyzing the rescues that have been designed for the government-sponsored enterprises, the auto industry, and for the banking system through the Troubled Asset Relief Program (TARP). He was soon appointed chief restructuring officer at the Treasury Department, where he oversaw and managed the department’s largest investments in the financial sector. Once at Treasury, AIG occupied about two-thirds of Millstein’s time, but he also worked on the Ally Financial restructuring and provided advice on the insolvency-related provisions of the Dodd-Frank reform legislation.

Millstein left the Obama administration in 2011. “By then, most of the banks had repaid their TARP money and the financial crisis had abated. AIG had been recapitalized and the only thing really left to do with it was to sell the shares the government was receiving in the recap,” he says.

Millstein was asked by Treasury Secretary Geithner to stay and work on Fannie Mae and Freddie Mac, but he decided it was time to leave. “It was pretty obvious to me that the political will to take on the complicated issues around the restructuring of Fannie and Freddie was just not there, so rather

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premium was not specific. According to Drain, in order for the make-whole premium to apply, the indenture needed to specifically provide that such a payment would be due in the event of automatic acceleration of the maturity date. He did leave open the possibility that a contract might provide for a make-whole payment as part of a bankruptcy

claim, but only if this language is expressly set forth in the contract.

That was not the only issue at hand. For example, the noteholders also tried to argue that the indenture included a no-call provision stating that the notes were not redeemable, thereby prohibiting early repayment of the debt. Drain said that this provision was

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Calendar

Beard Group

21st Annual Conference on Distressed Investing
December 1, 2014
The Helmsley Park Lane Hotel
New York, NY
Contact: (240) 629-3300

American Bankruptcy Institute

20th Annual Rocky Mountain Bankruptcy Conference
January 22 – 23, 2015
Four Seasons Hotel Denver
Denver, CO
Contact: www.abiworld.org

The New York Institute of Credit and

Association of Insolvency and Restructuring Advisors
10th Annual NYIC/AIRA Joint Bankruptcy & Restructuring Event
January 29, 2015
Arno’s Ristorante
New York, NY
Contact: www.instituteofcredit.org

American Bankruptcy Institute

VALCON 2015
February 25 – 27, 2014
Four Seasons Las Vegas
Las Vegas, NV
Contact: www.abiworld.org

National Association of Bankruptcy Trustees

2015 Spring Seminar
February 27 – 28, 2015
Charleston Place
Charleston, SC
Contact: www.nabt.com

International Association of Restructuring, Insolvency & Bankruptcy Professionals

2015 Annual Regional Conference
INSOL San Francisco
March 22 – 24, 2015
The Fairmont San Francisco
San Francisco, CA
Contact: www.insol.org

Special Report

Nation's Largest Claims Administrators

Firm	Key Contacts		Recent Cases
American Legal Claim Services Jacksonville, FL www.americanlegalclaims.com	Benny Davis, Jr.	Jeffrey L. Pirrung	MacKeyser Holdings, Raser Technologies, Qimonda Richmond, RoomStore, Pulp Finish 1 Company (f/k/a Journal Register Company), KIT digital, Inc., Life Care St. Johns, Inc. dba Glenmoor, Stelera Wireless, Complete Hydraulic Service and Sales, Refco Public Commodity Pool.
BMC Group New York, Los Angeles, London www.bmcgroup.com	Sean Allen	Tinamarie Fell	Quantum Foods, St. Francis Hospital, Velti, Inc., Mississippi Phosphates Corporation.
Donlin Recano New York, NY www.donlinrecano.com	Alexander T. Leventhal Mike Wyse Nellwyn Voorhies-Kantak	Mitch Ryan	Rural/Metro Corp., Essar Steel Algoma Inc., Dots, LLC, Cengage Learning, Inc., Betsey Johnson, Interfaith Medical Center, Longview Power, Excel Maritime Carriers.
Epiq Systems New York, NY www.epiqsystems.com	Lorenzo Mendizabal James Katchadurian Jane Sullivan Jennifer Mercer	Lance Wickel Alicia Den Beste Kelly Desgrosseilliers	Energy Future Holdings, LDK Solar Systems, Country Stone, AWI Delaware, The Budd Company, Love Culture, Natrol Resources, Buccaneer Energy, PSL-North America, Licking River Mining, Nautilus Holdings, Pacific Steel Casting, The Krisam Group, Casa Grande Regional Medical Center, James River Coal, F & H Acquisition Corp., IBCS Mining.
GCG Lake Success, NY www.gcginc.com	Angela Ferrante	Craig Johnson	Energy Future Holdings, Genco Shipping and Trading, OCZ Technology, Long Beach Medical Center, Sears Methodist Retirement System.
KCC El Segundo, CA www.kccllc.com	Albert Kass Deirdre McGuinness Bryan Butvick	Francine Gordon Jason Horwitz Eric Kerwood	City of Detroit, Telexfree, Source Interlink, Amsterdam House, Eagle Bulk Shipping, FCC Holdings, Global Aviation, Endeavor International, Victor Oolitic, C&K Market, RIH Acquisition, Momentive Performance, Source Home, Event Rentals, Cloudeeva Inc.
Logan & Company Upper Montclair, NJ www.logan.com	Kathleen Logan	Melissa Mendez	Miller Auto Parts & Supply Company, Reichhold Holdings US, Seegrid Corp., USEC, 10 Long Ridge Road Operating Company II, MSD Performance, Oxford Building Services, Rapid-American Corporation, Yarway Corporation.
Prime Clerk New York, NY www.primeclerk.com	Howard A. Blaustein Michael J. Frishberg Shai Y. Waisman	Chris R. Schepper Benjamin P.D. Schrag	Trump Entertainment Resorts, NII Holdings, SIGA Technologies, Alco Stores, Constar International, Tuscan International, Optim Energy, Noble Logistics, Sbarro, MModal, Global Geophysical, Simplicity, Entegra Power, CWC (f/k/a Coldwater Creek), GSE Environmental, Mineral Park, Universal Cooperatives, Tactical Intermediate Holdings, MIG LLC.
Rust Consulting Omni Bankruptcy Los Angeles, New York www.omnimgt.com	Brian Osborne Paul Deutch	Eric Schwarz Katie Nownes	Fisker Automotive Holdings, Glacial Energy, Phoenix Payment Systems, Inc., Kid Brands, Inc., Elephant Bar, Inc., Momentive (committee), First Mariner Bank, Restora Healthcare, Keywell, LLC, Sbarro (committee), Brookstone (committee), Mi Pueblo San Jose, Inc., Exide (committee), Intellittravel, Inc., American Suzuki Motor Corporation.
UpShot Services Denver, New York, Chicago www.upshotservices.com	Travis Vandell Robert Klanser Brelle Rohwer	Randall Reese David Sharp David Leamon	Saab Cars North America, Monroe Hospital, Ambient Corporation, Western MD Lumber, DynaVox Inc, Allonhill LLC, Color Star Growers of Colorado, Amarillo Biosciences, Mercantile Bancorp, Hi-Way Equipment, Pitt Penn Holding Co, Inc., Sanctioned Automotive Group. □

Worth Reading

Insull: The Rise and Fall of a Billionaire Utility Tycoon

Author: Forrest McDonald

Publisher: Beard Books

Softcover: 366 pages

List price: \$34.95

Few people today have heard of Samuel Insull, yet in the 1920s and 1930s this utility tycoon from Chicago was as well-known as Thomas Edison. By the early 1930s, his gas and electric empire extended across more than half the nation. Soon after, however, his empire collapsed, causing millions of investors to lose billions of dollars – making Insull as infamous as Ken Lay, Bernie Ebbers, and other disgraced corporate executives. He was brought to trial by the U.S. government, his reputation destroyed and his fortune lost.

Insull: The Rise and Fall of a Billionaire Utility Tycoon chronicles the life of this fascinating businessman. Although he ended with his reputation disgraced, he was an astute businessman, helping pioneer the concepts of mass production and selling at the lowest possible cost as ways to build market share.

Insull's foray into the developing electric power industry began when he became Edison's secretary. He proved himself invaluable to the great inventor, managing Edison's business affairs and financial matters and eventually serving on the board of directors of the Edison General Electric Company (now General Electric Company) founded in 1889.

In 1892, Insull became the president of the Chicago Edison Company and helped make the city into a major hub of commerce, in part by playing a major role in that city's hosting of the World's Fair of 1893. Insull parlayed the fame and success of the World's Fair to become one of the most important figures in Chicago and the United States. He formed relationships with local and national politicians, bankers, top business leaders, and investors. In pursuit of his outsized ambitions for himself, his company, and electrical energy, he became involved in increasingly complex financial transactions with an increasingly wider circle of individuals. Acquiring and merging with other electric companies and related businesses, Insull received more and more publicity as an influential, forward-thinking corporate executive. Innovative ideas introduced by Insull included open-end mortgages for business expansion, rigorous cost accounting standards, recognition of labor unions, and mass marketing.

As is the case with many failed businesspersons, Insull's downfall was brought about by questionable financial dealings. In 1930, a Chicago grand jury indicted Insull, his son, and some associates. He was eventually acquitted of all charges, but his downfall was complete. A Chicago newspaper summed up the trials as: "Insull and his fellow defendants – not guilty; the old order – guilty."

In this masterful biography, Insull is presented as a flesh-and-blood character with magnified talents, dreams, and flaws. He became enmeshed in political and economic forces beyond his control and became a scapegoat for the Great Depression that was just beginning to unfold. □

Forrest McDonald retired in 2002 as Distinguished University Research Professor at the University of Alabama after a teaching career at Brown University, Wayne State University, and the University of Alabama. He is the author of numerous books.

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com.

Millstein, from page 4

preside over yet another inter-agency study group, I left."

Millstein took five months off, talked to several firms about running their restructuring business, but ultimately decided to become an entrepreneur instead. So, "at the tender age of 55," as he puts it, Millstein started Millstein & Co. His firm quickly established a presence in the restructuring and policy worlds and now has 30 employees working in New York and Washington. Millstein & Co. currently represents the government of Puerto Rico, helping it manage its \$70 billion of debt, and represented U.S. Airways in its successful acquisition of American Airlines out of Chapter 11. Millstein's group is also representing the first-lien creditors in the Texas Competitive Energy Holdings bankruptcy.

Millstein is pleased with his firm's success: "We pretty quickly established ourselves as one of the go-to firms in the restructuring business and, in a very slow restructuring market, we have gotten our fair share of the work that is available."

While Millstein is happy to be running his own business, he doesn't rule out a return to government. "You never say never. Frankly, I think there remains a lot of risk in the financial system and volatility in the world economy. I view myself as a creative problem solver, and one of the reasons I've always liked the restructuring business is that the deals cannot be put together with a cookie cutter. There's a real premium on creativity. And so, if there were another large problem to solve inside the government, I might be enticed to rejoin the government to deal with it."

In the meantime, Millstein is living a full life. He and his wife reside in Washington, D.C., where they moved in 2009. His children are all in college now, giving Millstein time to teach a course on financial regulation at Georgetown University Law Center. He has also spent the last three years on an American Bankruptcy Institute commission studying the reform of Chapter 11. "Teaching is one way of giving back to my profession, and serving on the commission is one way of trying to improve the law," he says.

One senses, though, that his political inclinations, satiated during his time at the Treasury Department, are never far away. "I enjoyed my time in the government. The stakes were high. And while there were critics on both the right and the left, we proved that the federal government can be effective in resolving what at the time was a real national emergency." □

Special Report

Outstanding Turnaround Firms – 2014

Firm	Senior Professionals	Outstanding Achievements	
Alix Partners New York, NY www.alixpartners.com	John Castellano Lisa Donahue Randall Eisenberg Holly Etlin	David Johnston James Mesterharm Edward "Ted" Stenger Larry Young	Advisor and/or interim manager to Atlantic Power Corp., Eastman Kodak, Momentive Performance Materials, Nautilus Holdings, New Koosharem Corp., Puerto Rico Electric Power Authority, RadioShack, Sorenson Communications, and USEC.
Alvarez & Marsal New York, NY www.alvarezandmarsal.com	Antonio Alvarez III Stefaan Vansteenkiste Robert Caruso Thomas Kolaja	Bill Kosturos Douglas McIntosh Jeffery Stegenga Robert Campagna	CEO to Exide Technologies and American Apparel; FA to Cengage Learning, Energy Future Competitive Holdings, Longview Power, Fresh & Easy Neighborhood Market, EveryWare Global, Yeshiva University; CRO to MEPCO.
Conway MacKenzie Birmingham, MI www.ConwayMacKenzie.com	Van E. Conway Donald S. MacKenzie Charles M. Moore Joseph M. Geraghty	Gregory A. Charleston John T. Young, Jr. Steven R. Wybo A. Jeffrey Zappone	Operational restructuring advisor to City of Detroit (largest muni bankruptcy in U.S. history); CRO to Buccaneer Energy; restructuring advisor and interim CFO to Natrol; interim CFO to Natural American Foods; CRO to Surefire Industries USA.
Deloitte Financial Advisory Services, Deloitte Corporate Restructuring Group New York, NY www.deloitte.com/us/crg	Sheila T. Smith William K. Snyder Michael J. Epstein T. Scott Avila	Kirk Blair Lisa Poulin Louis E. Robichaux IV Stephen S. Gray	CRO to Velti PLC; advisor/interim CFO and CRO to ALCO Stores; advisory and restructuring services to Hamilton Metal and T.C. Global/Tully's Coffee; advisory services to American Airlines during bankruptcy and through US Airways merger.
Development Specialists, Inc. Chicago, IL www.dsi.biz	William A. Brandt, Jr. Fred C. Caruso Patrick J. O'Malley Joseph J. Luzinski	Bradley D. Sharp Geoffrey L. Berman Mark Manski Steven L. Victor	FA to Patton Boggs lending group and Dreier; CRO, Laboratory Partners, Binder & Binder, and Variant Holding Company; post-confirmation agent, Namco Liquidating Trust; liquidating trustee, Vineyard National Bancorp; FA, Beverly Hills Bancorp.
Executive Sounding Board Associates Philadelphia, PA www.esba.com	Robert D. Katz Michael Dervis Geoffrey M. DuFrayne	Michael DuFrayne Robert Agarwal Neil E. Leary	Advisor to Cooper-Booth Wholesale; CRO and crisis manager for Colorep & Transprint USA; chief trustee officer in f/k/a Metaldyne 363 sale with 600% recovery; FA/debtor advisor to Chiyoda Gravure; chief liquidating officer, DeCoro USA.
FTI Consulting, Inc. New York, NY www.fticonsulting.com	Michael Buenzow Keith Cooper Bob Duffy Michael Eisenband Ron Greenspan	Michael Katzenstein Bob Medlin Carlyn Taylor Greg Watson	CRO of Corinthian Colleges; interim CFO of 21st Century Oncology; FA to Residential Capital, Martifer Solar, Classic Party Rental, Edwin Watts; represents UCC of Energy Future Holdings, NII Holding, Momentive Performance Materials.
Gavin/Solmonese LLC Wilmington, DE www.gavinsolmonese.com	Ted Gavin Thomas D. Hays, III Stephen L. Kunkel Pamela O'Neill	Timothy Skillman Joe Solmonese Wayne P. Weitz	Debtor engagements include CRO of steel fabricator and FA to petroleum company; creditor engagements include UCC in Revel Hotel & Casino, Simplexity, Mineral Park Holdings, and Exide Technologies, and Energy Futures Holdings bondholders.
Goldin Associates New York, NY www.goldinassociates.com	Will Edwards Harrison J. Goldin Marti Murray David Pauker	David Prager Seymour Preston Gary Polkowitz Rob Vanderbeek	Company/shareholder advisor or interim manager: Dolan, Fletcher Int'l, Thornburg Mortgage, several private mandates; creditor/lender/committee advisor: Caesar's, Detroit, Optim Energy, RG Steel, Stanford Financial, Taylor Bean Whittaker.
Huron Consulting Group Chicago, IL www.huronconsultinggroup.com	Dawn Gideon James Nugent Ray Anderson Laura Marcero	Geoff Frankel Jerry Loughren Jamie Lisac Stuart Walker	Interim mgmt.: Revstone Industries, ASG Software Solutions, New United Motor Manufacturing, United Medical Center, Euramax International, Rotech Healthcare; FA: Great Lakes Aviation, VAS Aero Services, Wingspan Portfolio Holdings.
Mesirow Financial Consulting New York, NY www.mesirowfinancial.com/mfc/	Ralph Tuliano Larry Lattig Stephen Darr James Feltman	Monty Kehl Melissa Knoll Kevin Krakora Jack Williams	FA to indenture trustee for noteholders of Energy Future Holdings; FA to UCC of AMR, noteholders of Endeavor International, Ch. 11 trustee of Telexfree, and UCCs of Buffet Partners, Liberty Medical, Savient Pharmaceuticals, and Sbarro.
Zolfo Cooper New York, NY www.zolfocooper.com	Joff Mitchell John Boken Scott Winn Sherman Edmiston III Carol Flaton	Dave MacGreevey Kevin Nystrom David Orlofsky Mark Rechan	CRO of Preferred Sands, The Dolan Company, DiscoverReady, Milagro Oil & Gas; advised Patton Boggs executive committee, Contessa Premium Foods; advised lenders to James River Coal, Mineral Park, Oxford Mining; advised ResCap noteholders.

Momentive, from page 4

not specifically a no-call provision, but a mechanism to introduce a provision that provided for a make-whole premium to be paid under certain circumstances, none of which were triggered here. Additionally, the noteholders sought, post-petition, to rescind the automatic acceleration of the notes that occurred upon the bankruptcy filing, holding that the automatic stay barred the deceleration of the debt, but Drain didn't allow this. However, these issues are too expansive for current discussion.

In regard to the issue of enforceability of a make-whole provision, however, the ruling in the case, generally referred to as *Momentive*, is consistent with other recent decisions on enforceability of

make-whole provisions in bankruptcy, says Andrew I. Silfen, a partner in the bankruptcy and financial restructuring group of Arent Fox LLP. "Make-whole provisions generally are enforced by bankruptcy courts where the premium is triggered by the express contract terms, the make-whole provision is a valid liquidated damages provision under state law, and the premium is reasonable under section 506(b) of the Bankruptcy Code," he explains. "Therefore, while the decision is garnering significant attention, it does not alter existing law."

Rather, Silfen says, the ruling should serve as a guide to attorneys drafting make-whole provisions in indentures. "The language that specifies when a payment is triggered should be clear and unambiguous," he says. "Specifically, such provisions should explicitly require payment even upon acceleration of maturity as a result of a bankruptcy

filing or other enforcement actions taken by the indenture trustee or holders. Parties should also be careful to limit the amount of the make-whole provision so that it is proportionate to the expected loss due to early repayment (i.e., not an impermissible penalty)."

Silfen notes that this may be easier said than done. "Raising an issue that is only implicated upon a bankruptcy filing will not be a popular position around the drafting table," he says.

"It's not that lawyers don't know how to draft language that works; at this point, we do," says Damian S. Schaible, a partner in the insolvency and restructuring group at Davis Polk & Wardwell LLP. "The question is what the market will bear when putting together new financings. Will the market support and demand make-whole provisions that actually work, as opposed to provisions that just conform to precedent deals?"

Next month we'll discuss another element of Judge Drain's *Momentive* ruling, that the debtors could satisfy the cramdown provisions of 1129(b) without providing a market rate of interest. □

Judge Drain ruled against the senior noteholders primarily on the grounds that the language in the indenture relating to the make-whole premium was not specific.

Meridian, from page 2

decision in *Meridian* and are following it closely," she says. "Those entities which are active in the distressed-debt market play an important role in the loan market by providing much needed liquidity to other lenders seeking to sell their debt. Distressed-debt funds are necessary for a properly functioning market. Any restrictions placed on such distressed debt investors is worrisome and could impede the liquidity of our market."

Griffiths asked Marsh: If the loan assignment at issue in *Meridian* had been documented on an LSTA form, would the distressed-debt funds have had recourse to the assignor in the event they were deemed not to be an eligible assignee? The answer, in sum, is no. When LSTA parties trade a performing loan, they settle that trade on an assignment agreement attached to the relevant credit agreement – and the seller makes very few representations in an assignment agreement. "Typically, it represents, for example, that it is the legal and beneficial owner of the loan being assigned to the buyer and, for certain deals, that it is not a defaulting lender; however, the seller expressly assumes no responsibility with

respect to the legality or enforceability of the loan documents," says Walsh. "In fact, it is the buyer that represents it meets all the requirements to be an assignee under the credit agreement."

For her part, Marsh recommends that loan-market participants involved in negotiating credit agreements ensure that the definition of "eligible assignee" is drafted as broadly and as clearly as possible so that loans can easily be transferred to all the different entities active in the loan market.

Alternatively, Marsh says, when the borrower has opted to use a disqualified lender list, it should try to follow the LSTA "DQ structure," which is a structure MCAPs provide for a borrower to identify "disqualified institutions" – i.e., those that are not eligible to become a lender under the credit agreement, by assignment or participation. In developing the structure, Walsh says, the LSTA considered the concerns of all interested parties, including borrowers and lenders, in order to avoid impeding the liquidity of the market or contributing to delays in settling loan trades – and she believes it's "a sound, workable structure for handling, monitoring, and, when necessary, updating lists of disqualified institutions, which

finely balances the competing demands of all interested parties, as well as the market as a whole." As a result, Walsh recommends that when the borrower has opted to use a disqualified lender list, it "ensures that any disqualified institutions are clearly identified and that the list of such disqualified institutions is posted on the relevant electronic platform so that it may easily be accessed by lenders in the syndicate." □

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Gnome de Plume

New Rules for Easy Money

by Andy Rahl

The Fed's massive monetary easing has changed much of the financial landscape, but many still have not adjusted to the new reality.

I've already covered some of this – in particular the extent to which the level of financial restructuring activity and accompanying professional work has been greatly reduced. I've also noted that it will be a huge shock when rates do go back up to pre-financial crisis levels, but not to hold your breath for that to happen any time soon. Not even, I suspect, during the second half of 2015, assuming the Fed does start raising rates around then. That's because I don't think the Fed can afford to raise rates very much, in part because it can't run the risk of the kind of economic shock it would take to engender a serious increase in restructuring activity. And also because it's clear that Congress will be doing little or nothing in terms of spending initiatives for the next two years.

So what of all of the hand wringing about income inequality and the squeeze on the middle class? Sure that's a problem, but not for many of the reasons our fine politicians and journalists are putting forth. To start with, the widely held idea that we're in trouble because wages aren't rising even though the unemployment rate has dropped is silly. Upward wage pressure won't manifest until employment gets tight and there is no question that we still have a lot of employment slack today. How can wages go up when it's still an employers' market for jobs?

Then there's the left-wing idea that raising taxes will help by leveling things out. We still haven't recovered from the financial crisis and we've already had a tax increase via Obamacare. The last thing we need is another one to further hurt demand. Equally dumb is the right-wing idea that we need to balance the national budget right away. That would be a throwback to 1937 when Roosevelt killed our recovery from the Depression by trying to balance the budget then. Someone should tell Paul Ryan that he's pushing an archaic, discredited Democratic agenda.

We also still have a lot of inflation hysteria. As with the point that we need full employment in order to have upward pressure on wages, it should be equally obvious that inflation won't kick up either until we reach the point where employment gets tight. Until then, don't expect rates to go up much and don't expect the equity markets to go down much either. But, I also hear, those low inflation numbers must be understated because, as everyone knows, prices are a lot higher than they used to be. Well they are, but that is due to the fact that inflation is measured as a yearly rate that compounds over time. Even with average inflation of around 2% since the financial crisis, that has compounded to a net 12% increase since 2009.

Speaking of equity markets, here's a new reality that isn't political. The traditional asset allocation advice for personal investing – equity when young and fixed income after retirement – went out the window with the bailouts and easy money. I've been spending more time in sunny Florida lately and am amazed at how many retired people have been out of equity since the financial crisis – and so have missed all of those gains over the last five years, not to mention the last five weeks. Sure the equity market will go down again some day, but not until the Fed lets it or unless a big asteroid hits the earth first.

That's all for now. Please don't forget the 21st annual Distressed Investing Conference to be held in New York City on Monday, December 1 – I hope to see you there! ☐

Register Now!

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